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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

APR - 2 1991

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Application of)
SHURBERG BROADCASTING OF HARTFORD) File No. BPCT-831202KF
For Construction Permit for a New)
Television Station on Channel 18)
in Hartford, Connecticut)

TO: Clay C. Pendarvis, Chief
Television Branch, Video Services Division
Mass Media Bureau

OPPOSITION OF SHURBERG BROADCASTING OF HARTFORD
TO PETITION TO DENY

1. Shurberg Broadcasting of Hartford ("SBH") hereby opposes the Petition to Deny filed with respect to its above-captioned application by Astroline Communications Company Limited Partnership, Debtor-In-Possession ("Astroline D.I.P."). ^{1/} The gist of Astroline D.I.P.'s Petition is that SBH could have filed, but did not file, an application for the Channel 18 facilities during the December 1, 1988 - March 1, 1989 "open window" period

^{1/} In its Petition Astroline D.I.P. has misstated the names of both SBH and itself. While SBH's application was first filed in the name of "Shurberg Broadcasting of Hartford, Inc.", on March 24, 1989, SBH amended its application to reflect that the applicant is Alan Shurberg d/b/a Shurberg Broadcasting of Hartford. Since the sole principal of the applicant has at all times been Alan Shurberg, this amendment was not a major amendment and it is understandable how Astroline D.I.P. might have overlooked it.

More surprising is Astroline D.I.P.'s failure to note its own change in status. Since at least December, 1988, the licensee of Station WHCT-TV has been immersed in bankruptcy proceedings which have forced it into the position of a debtor-in-possession. This change -- which has been formally approved by the Commission in File No. BALCT-881227KE -- is not reflected in Astroline D.I.P.'s Petition.

created by the filing of Astroline D.I.P.'s renewal application. Therefore, according to the Petition, the SBH application which was accepted by the Commission ^{2/} should not have been accepted. As set forth below, this argument is completely without legal or factual foundation.

2. As an initial matter, contrary to Astroline D.I.P.'s self-serving (and wholly unsupported) claims, SBH's application has been pending before the Commission since it was first filed in 1983. In its decision rejecting SBH's Petition for Extraordinary Relief in 1984, the Commission did not deny, dismiss or return SBH's application; none of the ordering clauses of the Commission's Memorandum Opinion and Order purported to dispose of SBH's application. See Faith Center, Inc., 99 F.C.C.2d 1164, 57 R.R.2d 1185 (1984). Similarly, neither the U.S. Court of Appeals for the District of Columbia Circuit nor the United States Supreme Court addressed in any meaningful sense the pendency of SBH's application. ^{3/} This explains why

^{2/} A copy of the public notice reflecting acceptance of SBH's application is included as Attachment A hereto.

^{3/} Astroline D.I.P. absolutely misstates the holdings of both the Court of Appeals and the Supreme Court when it suggests that both of those courts specifically resolved non-constitutional issues arising from the Commission's December, 1984 action. See Petition at 3-4. None of the three separate opinions from the Court of Appeals panel purported to resolve any non-constitutional issues. To the contrary, all are directed exclusively to the constitutional issues, with (at most) only passing, non-decisional references made to any procedural matters. And those references reveal that the judges themselves did not believe that non-constitutional issues had been addressed and resolved. See, e.g., Shurberg Broadcasting of Hartford, Inc. v. FCC, 876 F.2d 902, 66 R.R.2d 261, 265, 283, n.3 (Wald, J., dissenting).

Astroline D.I.P. has failed to cite any specific ruling from any source in support of the claim -- a claim which is absolutely crucial to Astroline D.I.P.'s -- that SBH's application has not been pending.

3. In contrast to Astroline D.I.P.'s claims, SBH can point to multiple indications confirming the continued pendency of its application. First, as SBH noted in its February 28, 1989 letter to the Commission, the Commission's own records have consistently reflected that SBH's application has been pending since 1983.^{4/} Second, SBH has consistently taken steps to assure the continued accuracy of information in its application. This includes the amendment of its proposed transmitter site in August, 1989, as required by the elimination of the Commission's Cameron doctrine. See Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process ("Revision of

^{3/}(...continued)

It is even more ludicrous to claim (as Astroline D.I.P. does) that the Supreme Court "affirm[ed]" the Commission's decision on anything but constitutional grounds. Petition at 4. The Supreme Court resolves only those questions as to which certiorari is sought. Since the non-constitutional issues had not been resolved by the Court of Appeals, no party sought certiorari as to those issues, and they were not addressed by the Court. Astroline D.I.P. therefore cannot legitimately argue that acceptance of SBH's application, especially at this stage of the proceeding, has been judicially precluded.

^{4/} Of course, the announcement in February, 1991, that SBH's application was accepted absolutely confirms that that application was and has continuously been -- in the view of the Commission -- still pending.

Comparative Renewal Policies"), 4 FCC Rcd 4780, 66 R.R.2d 708 (1989), recon. denied, 5 FCC Rcd 3902, 67 R.R.2d 1515 (1990), reversing the policy articulated in George E. Cameron Jr. Communications, 71 F.C.C.2d 460, 45 R.R.2d 689 (1979). More directly, it also includes SBH's February 28, 1989 letter to the Commission in which it expressly set forth its understanding concerning the pendency of its application.^{5/} Third, the Commission itself contemplated, in its 1984 MO&O, that SBH's application would be considered at such time as a comparative proceeding were conducted with respect to Channel 18. Faith Center, Inc., supra, 57 R.R.2d at 1193.

4. Finally, and perhaps most damning from Astroline D.I.P.'s perspective, Astroline D.I.P. itself acknowledged that SBH's application was still pending more than a month after the Commission's December, 1984 MO&O. At that time Astroline D.I.P. filed a Motion to Dismiss SBH's application. Obviously, if Astroline D.I.P. had believed that SBH's application was no longer pending, it would not have filed such a motion. One more factor which further supports SBH's position and further

^{5/} It bears noting that none of SBH's amendment materials was ever returned by the Commission. This further supports SBH's view that its application was continuously pending -- had it not been, presumably the Commission would have so advised SBH by returning or rejecting the materials which SBH continued to file with respect to that application. (As an example, the Commission rejected one of the other Channel 18 applications, that of Edmund S. Cromartie.) As noted, the Commission has not done so, even after the Supreme Court's decision affirming the constitutionality of the minority distress sale policy. To the contrary, also as noted above, far from returning SBH's application and related amendments, the Commission has since formally and unequivocally accepted that application for filing.

undermines Astroline D.I.P.'s here is the fact that Astroline D.I.P.'s motion (which SBH, of course, opposed) was never granted.

5. In a feeble attempt to bolster its bogus claim that SBH's application has not been "pending", Astroline D.I.P. cites the definition of the term "pending" found in Section 1.65 of the Commission's Rules. But in so doing, Astroline D.I.P. shockingly fails to note that that definition is expressly limited in applicability: the definition is, by the rule's own terms, intended to apply "[f]or the purposes of this section." Section 1.65(a). There is absolutely no basis -- and certainly Astroline D.I.P. has cited none -- for concluding that an application which has been neither dismissed, returned or denied is not "pending", even if the on-going reporting requirements of Section 1.65 have not been triggered.

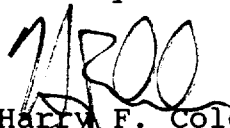
6. SBH has litigated for more than seven years, before the Commission and all levels of the Federal judiciary (including the U.S. Supreme Court), for the opportunity to compete for Channel 18; SBH has diligently sought to comply with the Commission's requirements concerning its application, including the preparation and submission of an extensive technical amendment in 1989; SBH wants the channel, and is eager to compete for it. ^{6/} No amount of wishful thinking or bogus arguments by

^{6/} As a practical matter, it appears to SBH that Astroline D.I.P. should be reluctant to attempt to secure the dismissal of SBH's application on such flimsy grounds. In the extremely unlikely event that Astroline D.I.P. were to be successful in that effort, (continued...)

Astroline D.I.P. can legitimately deprive SBH of that which it has sought for more than seven years: the opportunity to compete for the channel. In accepting SBH's application, the Commission has moved one step closer to final resolution of the fate of Channel 18 in Hartford. Astroline D.I.P.'s Petition is a meritless and ultimately futile attempt to undo the salutary effects of the Commission's action. That Petition should be rejected, and the long-delayed comparative proceeding for Channel 18 in Hartford should be commenced promptly.

WHEREFORE, for the reasons stated, Shurberg Broadcasting of Hartford opposes the Petition to Deny filed by Astroline Communications Company Limited Partnership, Debtor-in-Possession.

Respectfully submitted,


/s/ Harry F. Cole
Harry F. Cole

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April 2, 1991

^{6/}(...continued)

SBH would merely take appropriate steps to secure appropriate appellate review of that decision, review which SBH is confident would ultimately result in the assurance, to SBH, of full comparative consideration.

ATTACHMENT A



PUBLIC NOTICE

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FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W.
WASHINGTON, D.C. 20554

11679

News media information 202/632-5050. Recorded listing of releases and texts 202/632-0002.

BROADCAST APPLICATION

Report No. 14926

Released: February 8, 1991

NOTICE IS HEREBY GIVEN that the below-described applications are accepted for filing. These applications were timely filed against the application of Astroline Communications Company Limited Partnership for renewal of the license of Station WHCT-TV, channel 18, Hartford, Connecticut. Petitions to deny the below-described application may be filed no later than the close of business on March 18, 1991. Since the time within which competing applications may be filed against an application for renewal of license is established by Section 73.3516(e) of the Commission's Rules and the license of broadcast station in Connecticut expired on April 1, 1989, competing applications were required to be on file by the close of business on March 1, 1989. Consequently, no competing applications may now be filed.

BPCT-890301KN	Hartford, Connecticut SAGE BROADCASTING CORPORATION Channel 18 Proposed the existing facilities of station WHCT-TV
BPCT-890301KM	Hartford, Connecticut LYNNETTE ELLERTSON Channel 18 Proposed the existing facilities of station WHCT-TV
BPCT-890301KK	Hartford, Connecticut GLORIA W. STANFORD Channel 18 ERP(Vis): 158 kW; HAAT: 619.9 ft. (189 m.)
BPCT-831202KF	Hartford, Connecticut SHURBERG BROADCASTING OF HARTFORD, INC. Channel 18 ERP(Vis): 5,000 kW; HAAT: 188.7 m. (619 ft.)

DECLARATION

I hereby certify that, on this 2nd day of April, 1991, I caused copies of the foregoing "Opposition of Shurberg Broadcasting of Hartford to Petition to Deny" to be hand served on the following:

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/s/ Elizabeth A. Holbrook
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